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426861—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 704

UNITED STATES OF AMERICA EX REL. ENG FON SING, PETITIONER

v.

BYRON H. UHL, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF NEW YORK, OR ANY OTHER PERSON HAVING THE BODY OF SAID ENG FON SING IN CUSTODY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 90) is reported in 122 F. (2d) 552. The opinion of the District Court (R. 71–75) is reported in 40 F. Supp. 602.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 16, 1941 (R. 91). The petition for a writ of certiorari was filed October 16, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the action of the immigration authorities in considering the question of petitioner's age was so improper, or

the evidence was so insufficient to sustain the decision excluding him from admission to the United States, as to render the hearing unfair or the decision arbitrary.

STATUTE INVOLVED

Section 1993 of the Revised Statutes, as amended (8 U. S. C., sec. 6) provides:

> Any child hereafter born out of the limits and jurisdiction of the United States whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. * * *

STATEMENT

Petitioner arrived at the Port of New York from China on October 6, 1939 (R. 11), and applied for admission to the United States as a citizen under Section 1993 of the Revised Statutes. He claimed that he was the son of a foreign born citizen and was born after his father's entry into the United States (R. 11, 23, 25).

At a hearing before a Board of Special Inquiry on November 28, 1939, there was heard the testimony of petitioner, his father and a brother (R. 11–36). This testimony, which was substantially identical as to family relationship, was as follows:

Ng Goot Foo, the father, was married in China on May 2, 1921, to a Chinese woman (R. 12, 32). He left China for the United States in October 1921 (R. 13, 33), and was admitted at New York as the son of a citizen on November 22, 1921 (R. 12, 41). Petitioner was born in China on December 4, 1921 (which, of course, was after his father had entered the United States) (R. 12, 13, 18, 23, 25, 32). His age at the time of the hearing was, consequently, according to the testimony, 17 years, 11 months, and 24 days. No record of any kind to substantiate petitioner's birth date was produced, but

the father stated that he learned thereof in correspondence with his wife and also upon a subsequent visit to China (R. 13, 32–33, 34).

It was brought out at the hearing, however, that petitioner's father had testified in 1924, when he applied for a return certificate on a contemplated visit to China, that petitioner was born on October 16, 1921, when the father was in Hongkong en route to the United States, and that no children had been born since the father's admission to the United States in 1921 (R. 33, 83–84). In this state of the record the Board of Special Inquiry deferred action pending investigation (R. 36).

On December 4, 1939, the United States Public Health Service advised the Commissioner of Immigration by letter that petitioner had been examined to determine his age and that it was the opinion of the Service doctors that petitioner was over 21 years of age, and probably 22 to 25 years of age (R. 37).

The hearing was reconvened on January 4, 1940 (R. 38), at which time Dr. J. J. Griffitts of the Public Health Service testified that he had physically examined the petitioner and that on the basis of that examination, supported by a dental examination and an X-ray examination of petitioner's epiphyseal development, the opinion of those who examined petitioner was that he was over 21 years of age, probably between 22 and 25 (R. 39–40). Thus, according to Dr. Griffitts' testimony, petitioner was born in 1919 at the latest, at least two years before his alleged father established his residence in the United States.

At the conclusion of this hearing the Board of Special Inquiry excluded petitioner because it was not satisfied as to his citizenship (R. 41–46). The Board's decision was based upon the contradictory testimony of petitioner's father in 1924 that petitioner was born on October 16, 1921, prior to the father's entry into this country; upon the testimony of Dr. Griffitts that petitioner was over 21 years of age; and upon the expert opinions of two members of the Board, predicated upon years of experience as members of Boards of Special Inquiry in the Chinese

Division, during which time they had observed numerous Chinese applicants for admission coming from the same district of China as the petitioner, that petitioner was more than 18 years old, the age he claimed to be.[1]

The hearing was reopened on January 25, 1940, to receive the testimony of Dr. Maurice M. Pomeranz, an expert witness called on behalf of petitioner (R. 47). Dr. Pomeranz testified generally that epiphyseal development is not an accurate indicator of a person's age and that such development varies between different races and is influenced by nutrition, disease, heredity and environmental conditions (R. 47–49, 55–57). He also testified that height, weight and other physical characteristics are not reliable criteria of age (R. 49–55). Referring to the X-ray films of petitioner taken by the Public Health Service doctors, Dr. Pomeranz testified that it was impossible to place within a range of two or three years the epiphyseal development of petitioner and thus deduce his age (R. 55–57). He also stated that X-ray films of petitioner's alleged brother showed epiphyseal development beyond his actual age (R. 58–59). In summary, Dr. Pomeranz stated that in his opinion "this applicant could be the age claimed, namely, 18 years" (R. 59).

On February 13, 1940, Dr. Griffitts was recalled to testify concerning Dr. Pomeranz' X-ray films of petitioner's alleged brother and Dr. Pomeranz' testimony on January 25. Dr. Griffitts reiterated his opinion that petitioner was over 21 years of age (R. 63). He stated that Dr. Pomeranz' testimony dealt in generalities and that abnormal conditions affecting the factors entering into age determination, which were referred to by Dr. Pomeranz, were not found to exist in petitioner. In respect of the X-ray films of petitioner's alleged brother, Dr.

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[1] Petitioner's alleged father and brother each stated petitioner's age to be 19 (R. 11, 12, 18, 23), but this appears to have been based on Chinese reckoning of age, under which a chid is one year old at birth and his birthdays occur thereafter on Chinese New Years in January or February of each year.

Griffitts testified that a variation in the epiphyseal development of two of the brother's joints did not occur in petitioner (R. 63–64).

At the conclusion of the reopened hearing, the Board of Special Inquiry reaffirmed its earlier ruling excluding petitioner (R. 64–65). The Board of Review, on appeal, examined the evidence and affirmed the decision of the Board of Special Inquiry (R. 66–70).

Petitioner's father then filed a petition for a writ of habeas corpus on petitioner's behalf in the District Court for the Southern District of New York (R. 2–6). The writ issued (R. 7) and a return, which incorporated the record of the hearings before the Board of Special Inquiry (R. 9), was filed on behalf of the respondent (R. 8–10). The District Court, after a hearing, held that petitioner received a fair trial and that the decision of the immigration authorities on the issue of petitioner's age was not arbitrary and therefore must be sustained (R. 71–75). The court accordingly dismissed the writ and remanded petitioner to the custody of the immigration authorities (R. 76–77). The Circuit Court of Appeals, in a *per curiam* decision, unanimously affirmed the order of the District Court (R. 90).

ARGUMENT

Petitioner contends that he was denied a fair hearing before the immigration authorities, because (1) the question of his age was a feigned issue intentionally injected into the proceeding for the purpose of lending color to a pretended fair hearing and to support the exclusion order (Pet. 5–6), and (2) "the conduct of the immigration authorities constituted unfairness, arbitrariness and flagrant disregard of the uncontradicted credible testimony, scientific and otherwise, submitted by petitioner as to his relationship and age" (Pet. 6). These contentions find no support in the record and hence do not merit review by this Court.

1. Petitioner sought admission to the United States as a citizen under Section 1993 of the Revised Statutes (*supra*,

p. 2), claiming that he was the son of a foreign born citizen and that he was born after his father had established residence in this country. These were questions which the immigration authorities had power to determine and the burden was upon the petitioner to satisfy them of his citizenship. *Ng Fung Ho* v. *White*, 259 U. S. 276, 282; *Quon Quon Poy* v. *Johnson*, 273 U. S. 352, 358; *Gee Nee Way* v. *McGrath*, 111 F. (2d) 326, 327 C. C. A. 9; *Wong Tin* v. *Ward*, 102 F. (2d) 146 (C. C. A. 1). Since petitioner's claim of citizenship was based upon his birth having occurred within only two weeks after his father entered this country,[2] since petitioner appeared to members of the Board of Special Inquiry to be older than he asserted (R. 40–41, 44, 45), and since his father had made inconsistent statements as to petitioner's birth date, his age was patently a crucial issue under the statute, which it was the duty of the immigration authorities to resolve. Consequently, arbitrary action cannot be ascribed to them in passing upon the petitioner's age.

2. There was evidence before the immigration authorities contradicting that adduced by petitioner with reference to his age. It had been held in a number of cases, in one of which this Court recently denied a petition for a writ of certiorari, that the immigration officials are entitled to base exclusion upon evidence similar to that upon which they rested their order in the instant case; that such evidence is sufficiently substantial to foreclose any contention that the exclusion decision is arbitrary and unfair. *Mark Guey Him* v. *Reimer*, 115 F. (2d) 241 (C. C. A. 2); *Kong Din Quong* v. *Haff*, 112 F. (2d) 96 (C. C. A. 9), certiorari denied, 311 U. S. 706; *Hom Ark* v. *Carr*, 105 F. (2d) 607 (C. C. A. 9); *Fong On* v. *Day*, 54 F. (2d) 990 (C. C. A. 2); *Weedin* v. *Yeung Bon Lip*, 43 F. (2d) 465 (C. C. A. 9); *Lew Git Cheung* v. *Nagle*, 36 F. (2d) 452 (C. C. A. 9); *Fong Lim* v. *Nagle*, 2 F. (2d) 971 (C. C. A. 9).

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[2] His father was admitted to the United States on November 22, 1921. Petitioner claims to have been born on December 4, 1921.

CONCLUSION

The case was correctly decided below, and there is involved no conflict of decisions or any important question of federal law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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END OF A CASE